NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 20, 2024
Decided November 21, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 24-1588

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TROY D. LITAKER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:23-CR-30084-DWD

David W. Dugan,
Judge.

O R D E R

Troy Litaker pleaded guilty to distributing methamphetamine and was sentenced to 132 months in prison. He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief details the nature of the case and discusses issues that an appeal of this kind might be expected to involve. Because the analysis appears thorough, we limit our review to the subjects that counsel discusses or Litaker raises in his response under Circuit Rule 51(b). *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Litaker sold approximately half an ounce of methamphetamine (later revealed to contain 12 grams of actual methamphetamine) to a confidential source working with the Federal Bureau of Investigation. The confidential source recorded the transaction at Litaker's house in Fayette County, Illinois. Litaker was indicted under 21 U.S.C. § 841(a)(1) and (b)(1)(C). He ultimately pleaded guilty without a plea agreement.

The district court conducted the change-of-plea hearing, placing Litaker under oath before conducting a colloquy. The court asked Litaker to confirm that he understood the charges and applicable penalties, his trial rights, the consequences of pleading guilty, and the role of the Sentencing Guidelines. *See* FED. R. CRIM. P. 11(b)(1)(B)-(H), (L), (M). After finding that Litaker was competent, that the plea was knowing and voluntary, and that there was an adequate factual basis establishing Litaker's guilt, the court accepted Litaker's guilty plea.

At the sentencing hearing, the district court adopted the presentence investigation report. The court explained that the Sentencing Guidelines called for 151 to 188 months' imprisonment (based on an offense level of 29 and a criminal history category of VI), 3 years of supervised release, and a fine of $30,000 to $1,000,000. Litaker agreed that these figures were correct. The court then heard argument on Litaker's two motions for a below-Guidelines sentence of 100 months: the first based on his argument that his criminal history category of VI overstated the severity of his record and the second contending that, based on multiple mitigating factors, he should receive a prison term equal to the median given to convicted drug dealers in what he deemed the most fitting criminal history category (IV). The court denied Litaker's motions but, based on the factors under 18 U.S.C. § 3553(a), still imposed a below-Guidelines sentence of 132 months' imprisonment. It also imposed 3 years of supervised release, as well as a $250 fine and a $100 special assessment.

Counsel informs us that Litaker wishes to withdraw his guilty plea and therefore considers whether Litaker could raise a non-frivolous argument that his plea was not knowing and voluntary. *See United States v. Larry*, 104 F.4th 1020, 1022 (7th Cir. 2024). In his response, Litaker elaborates that he agreed only under duress to plead guilty and that his plea colloquy did not comport with Rule 11(b) of the Federal Rules of Criminal Procedure. Litaker did not move in the district court to withdraw his plea, so we would review only for plain error. *United States v. Schaul*, 962 F.3d 917, 921 (7th Cir. 2020).

Here, the court substantially complied with the requirements of Rule 11(b) and thus ensured that the plea was knowing and voluntary. *See United States v. Davenport*,

719 F.3d 616, 618 (7th Cir. 2013). In the plea colloquy, Litaker confirmed under oath that he understood the charges, the penalties, and the rights he would be waiving by not proceeding to a trial. He also affirmed that his plea was not the product of coercion. Litaker could not establish on appeal that it was plain error for the court to credit his own sworn statements. *See United States v. Peterson*, 414 F.3d 825, 827 (7th Cir. 2005).

Counsel notes two potentially relevant omissions from the plea colloquy but determines that they were harmless. First, the court did not warn Litaker that lying under oath could lead to a prosecution for perjury, *see* FED. R. CRIM. P. 11(b)(1)(A), but nothing in the record suggests that he faces any risk of such a prosecution, *see United States v. Stoller*, 827 F.3d 591, 597–98 (7th Cir. 2016). Second, the court did not discuss its authority to order restitution, *see* FED. R. CRIM. P. 11(b)(1)(K), but the court did not order restitution, *see Larry*, 104 F.4th at 1023. Therefore, neither omission could be plain error.

Counsel next considers, and correctly concludes, that any procedural challenges to Litaker's sentence would be frivolous. Litaker affirmatively agreed to the accuracy of the Guidelines calculations, thereby waiving any challenge. *See United States v. Fuentes*, 858 F.3d 1119, 1121 (7th Cir. 2017). The sentence does not exceed the maximum under 21 U.S.C. § 841(b)(1)(C), and the court addressed Litaker's mitigation arguments and the § 3553(a) sentencing factors, *see Gall v. United States*, 552 U.S. 38, 51 (2007).

In his response to counsel's motion, Litaker contests the duration of his sentence. But it would be frivolous for Litaker to argue that his sentence is substantively unreasonable. We review this issue for abuse of discretion. *United States v. Holder*, 94 F.4th 695, 700 (7th Cir. 2024). Here, the sentence is below the Guidelines range, creating a "nearly irrebuttable presumption" on appeal that it is not unreasonably long. *Id.* (citation omitted). Litaker could not show, as he would need to, that the sentence does not comport with the § 3553(a) factors. *See id.* In its sentencing explanation, the district court identified the seriousness of the offense (the "evil" effects of methamphetamine in a community), Litaker's lengthy criminal history and lack of respect for the law, and the need for the sentence to both punish and deter Litaker. Balancing these factors against Litaker's remorse, advanced age, and newfound sobriety, the court reasonably settled on the below-Guidelines sentence of 132 months.

Counsel also considers whether Litaker could mount a nonfrivolous challenge to the other facets of his sentence and appropriately finds that he could not. Litaker received the minimum term of supervised release under 21 U.S.C. § 841(b)(1)(C). The proposed conditions were set forth in the presentence investigation report, and Litaker

did not object in his memorandum or at the hearing when the court announced its intent to adopt the conditions. *See United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019). As for the fine, it is well below both the statutory maximum of $1,000,000, *see* 21 U.S.C. § 841(b)(1)(C), and the minimum of $30,000 recommended by the Guidelines, *see* U.S.S.G. § 5E1.2(c)(3); further, Litaker never contested his ability to pay, *see United States v. Picardi*, 950 F.3d 469, 473–74 (7th Cir. 2020).

Finally, counsel—who represented Litaker in the district court—bypasses any argument that Litaker received ineffective assistance of counsel. Litaker wishes to argue that counsel deficiently advised him against accepting a plea deal that would have resulted in less prison time and that counsel should have withdrawn from this appeal to allow an attorney with no conflict of interest to argue that trial counsel was ineffective. This argument, however, is not suited for direct appeal. *See United States v. Fuller*, 312 F.3d 287, 291 (7th Cir. 2002) (claim may be raised on direct appeal "when appellate counsel did not represent the defendant at trial or in pretrial proceedings"). As is usually the case, Litaker's argument must be reserved for collateral review, when an evidentiary foundation can be developed. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020).

We GRANT counsel's motion to withdraw and DISMISS the appeal.